Re Lo Kon Wah; ex p Jupiter Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D1-29-2021 OF 1998
MOHD GHAZALI J
9 NOVEMBER 1999

Bankruptcy *— Notice — Setting aside — Bankruptcy notice based on summary judgment — Whether summary judgment is final judgment within contemplation of s 3(1) of Bankruptcy Act 1967 — Bankruptcy Act 1967 s 3(1)*

The judgment creditor had entered summary judgment against the judgment debtor on 14 April 1998. The judgment debtor has appealed to the judge in chambers against the decision. On 2 July 1998, the judgment creditor issued a bankruptcy notice against the judgment debtor requiring him to pay the judgment sum. Later, the judgment debtor filed an application for an order that the bankruptcy notice be struck out and set aside. The senior assistant registrar ('the SAR') dismissed the application and hence this appeal. The judgment debtor contended that the summary judgment obtained against him is not final judgment within the contemplation of s 3(1) of the Bankruptcy Act 1967 ('the Act').

Held, dismissing the appeal:

The summary judgment entered against the judgment debtor is clearly a final judgment and hence falls within the contemplation of s 3(1)(i) of the Act. The judgment was obtained after the SAR heard arguments from both sides based upon affidavit evidence. The SAR was obviously of the view that there are no triable issues and hence had allowed the judgment creditor to enter summary judgment against the judgment debtor (see p 183A–C); *Re Udos ak Riging; ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 distinguished.

[Bahasa Malaysia summary

Pemiutang penghakiman telah mendapatkan penghakiman terus terhadap penghutang penghakiman pada 14 April 1998. Penghutang penghakiman telah merayu kepada hakim dalam kamar terhadap keputusan tersebut. Pada 2 Julai 1998, pemiutang penghakiman telah mengeluarkan notis kebankrapan terhadap penghutang penghakiman yang memerlukannya membayar jumlah penghakiman tersebut. Kemudian, penghutang penghakiman telah memfailkan perintah bahawa notis kebankrapan dibatalkan dan diketepikan. Penolong kanan pendaftar ('PKP') telah menolak permohonan tersebut dan sebab itulah rayuan ini dibuat. Penghutang penghakiman menegaskan bahawa penhakiman terus yang diperolehi terhadapnya bukanlah penghakiman muktamad di dalam maksud s 3(1) Akta Kebankrapan 1967 tersebut ('Akta tersebut').

Diputuskan, menolak rayuan tersebut:

Penghakiman terus yang telah dimasuki terhadap penghutang penghakiman adalah jelas suatu penhakiman muktamad dan dengan itu terjatuh di bawah maksud s 3(1)(i) Akta tersebut. Penghakiman tersebut diperolehi selepas PKP mendengar hujahan daripada kedua-dua belah pihak berdasarkan keterangan afidavit. PKP jelas berpendapat bahawa tiada terdapat isu-isu yang boleh dibicarakan dan oleh itu telah membenarkan penghutang penghakiman untuk memasuki penghakiman terus terhadap penghutang penghakiman (lihat ms 183A–C); *Re Udos ak Riging; ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 dibeza.]

Notes

For cases on setting aside of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1766–1785.

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1980] 1 MLJ 304 (refd)

Udos ak Riging, Re; ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 (distd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1), (i), 5(1)

Rudeen Chua (*Haniff & Rajendran*) for the judgment debtor.

KL Ng (*Abdul Razak* with him) (*Shui Tai*) for the judgment creditor.

Mohd Ghazali J: On 14 April 1998, the learned senior assistant registrar ('the SAR') allowed the application of the judgment creditor to enter summary judgment against the judgment debtor and another person in Civil Suit No D4-22-980-1997 at High Court Kuala Lumpur for the sum of RM2,460,377.66 with interest and costs. The judgment debtor has appealed to the judge in chambers against the decision of the SAR. Meanwhile on 2 July 1998 the judgment creditor caused to be issued a bankruptcy notice against the judgment debtor requiring him to pay the judgment sum in accordance with the terms of the judgment.

On 30 September 1998, the judgment debtor filed an application by way of summons in chambers (encl 5) for an order that the bankruptcy notice be struck out and set aside or in the alternative that the proceedings be adjourned until the disposal of his appeal to the judge in chambers which was filed on 17 April 1998.

In his affidavit in support of his application, the judgment debtor contended that the summary judgment obtained against him is not final judgment as falling within the contemplation of s 3(1) of the Bankruptcy Act 1967 ('the Act') and until the disposal of his appeal to the judge in

chambers, that summary judgment cannot be said to be a final judgment. In the alternative, he urged the court to grant him a stay pending disposal of the appeal.

Section 3(1)(i) of the Act read:

> A debtor commits an act of bankruptcy in each of the following cases:
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him to pay the judgment debtor or sum ordered to be paid in accordance with the terms of the judgment or order ... and he does not within seven days after service of the notice ... comply with the requirements of the notice ...
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> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

Section 5(1) of the Act provides a creditor shall not be entitled to present a bankruptcy petition against a debtor unless, inter alia:

(a) the debt amounts to RM10,000;

(b) the debt is a liquidated sum payable either immediately or at some certain future;

(c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.

On 8 December 1998, the SAR dismissed the application made by the judgment debtor (encl 5) and against that decision he has appealed.

On 10 August 1999, I dismissed the appeal and I now give my reasons.

At the hearing of the appeal, counsel for the judgment debtor argued that the words 'final judgment' is not defined in the Act. As to what is a 'final judgment' he referred to *Re Udos ak Riging; ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383. In that case, the judgment creditor obtained a judgment in default pursuant to the Subordinate Court Rules 1980 against the debtor in the magistrate's court. The debtor applied to set aside the judgment in default which application was dismissed by the learned magistrate. The debtor appealed. In the meantime the judgment creditor applied for the issue of a bankruptcy notice. The learned judge who heard the appeal was of the view that for the purpose of bankruptcy proceedings the default judgment is not a final judgment. At pp 387–388, he said:

> In my view, the said judgment will only be a final one after the debtor has exhausted his remedy given by law. I find support in the dicta of Lord Esher MR in *Re Riddel ex p Earl of Strathmore* (1888) 20 QB 512 where at p 516 he said:
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> '... in my opinion, a 'final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not everyone. ... In my opinion, the question

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> is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again.'

With respect to counsel for the judgment debtor in the instant case, I cannot see how a judgment in default can be equated with summary judgment. The
B summary judgment entered against the judgment debtor is clearly a final judgment and hence falls within the contemplation of s 3(1)(i) of the Act. The SAR's decision has disposed of the matter. The judgment was obtained after the SAR heard arguments from both sides based upon affidavit evidence. The SAR was obviously of the view that there are no triable issues and hence had allowed the judgment creditor to enter summary judgment
C against the judgment debtor. The O 14 judgment is final and an appeal to the judge in chambers from the decision would be as of right. No leave is required. In *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1980] 1 MLJ 304, the Federal Court reiterated that an order giving leave to sign a final judgment is a final and not an interlocutory order.

D Under the circumstances, I cannot find any basis in the argument forwarded by counsel for the judgment debtor that the summary judgment entered against the latter is not a final judgment or a final order.

Appeal dismissed with costs.

Appeal dismissed.

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Reported by Benjamin Yong

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